

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

4 UNITED STATES OF AMERICA Docket No. 3:13CV704

5 Plaintiffs, Toledo, Ohio

6 v. March 5, 2015

7 U.S. BANK NATIONAL

8 ASSOCIATION,

9 Defendants.

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11 TRANSCRIPT OF ORAL ARGUMENT HEARING
12 BEFORE THE HONORABLE JACK ZOUHARY
13 UNITED STATES DISTRICT JUDGE

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1 THE COURT: We're here on case number 13CV704,
2 United States versus U.S. Bank. This is a hearing on the
3 pending motion to dismiss.

4 By way of background, the matter has been briefed
5 with the following pleadings reflected on our docket,
6 docket numbers 25, 29, 30, 31, 34, 36, 38 and 43. We also
7 filed questions for today's hearing, and that is reflected
8 in docket number 44.

9 Present in court on behalf of -- well, we have
10 the United States present in an observation status I
11 understand. Welcome to Angelita Cruz Bridges and Trisha
12 Fitzgerald. On behalf of the relator plaintiff ABLE, we
13 have Aneel -- you're sitting in the back. Come up Aneel.
14 Stephen Dane, Andrew Neuhauser, Sasha Samberg-Champion and
15 George Thomas. On behalf of U.S. Bank we have Bill Porter,
16 Andrew Schilling and Bill --

17 MR. SIECK: Sieck.

18 THE COURT: Thank you.

19 MS. CRUZ-BRIDGES: Your Honor, I'm sorry to
20 interrupt. We did have an attorney from D.C. that was
21 supposed to be joining us on the bridge line. I'm not the
22 sure if he can hear or not.

23 THE COURT: Has he called in?

24 MS. CRUZ-BRIDGES: He said he that his and the
25 line was busy and he could not get in. I have his number,

1 I'm not sure if you're able to conference him in.

2 THE COURT: I was unaware of that.

3 MS. CRUZ-BRIDGES: I apologize, we did notify The
4 Court that he was going to be attending by phone.

5 THE COURT: Is he going to actually participate
6 or just listen?

7 MS. CRUZ-BRIDGES: He's just going to listen,
8 Your Honor. He just informed me in the e-mail that he's on
9 the line but he doesn't hear anything.

10 THE COURT: I don't know what line he's on
11 because we're not connected in here. So if he called the
12 bridge line -- do you know if that's what he did?

13 MS. CRUZ-BRIDGES: I believe so. I think he was
14 provided a number by The Court.

15 THE COURT: Brian Bowcut, are you on the phone?

16 MR. DANE: Your Honor, while we're waiting can I
17 introduce my partner John Relman. He's not admitted in
18 this case but made the trip here anyway.

19 THE COURT: Because he liked our weather.

20 MR. RELMAN: It's better than the D.C. weather
21 today.

22 MR. DANE: There was some risk I might not be
23 here and we're both on our way to Santa Fe anyway.

24 THE COURT: On the way to Santa Fe. Brian
25 Bowcut, are you on the phone?

1 MR. BOWCUT: Yes, I am. I apologize. The
2 conference line kicked me out and I just called back in.

3 THE COURT: I understand you're going to be
4 listening and not participating, so hopefully if the
5 lawyers use the microphones you'll be able to hear. If
6 they don't use the microphones then it may be difficult.
7 So I'll use this as a reminder to counsel, these
8 microphones move, slide them from the base towards you. I
9 don't care if you stand or sit, but I do require you to use
10 the mic unless you bellow without the mic. And then that's
11 okay. But especially with someone on the phone it's
12 difficult to hear unless you use the mic. Please one
13 person at a time. I will give everyone an opportunity to
14 speak.

15 If you haven't done this before with me, this is
16 not a what I'll call a traditional appellate type argument
17 where one side goes and then the other side goes. I will
18 probably interrupt you at some point during your answers so
19 that I can hear from the other side, in a point, counter
20 point type style. And sometimes we go back and forth a
21 bit. And sometimes we even spill over and begin to answer
22 more than the question that's presented before. But that's
23 okay too, we get through the agenda. You may have other
24 comments to make and I'm fine with that if time allows, but
25 I do want to focus, if we can, on the questions that we

1 presented to you in advance. And with that, I will give
2 defendant the first shot at answering question number one.

3 MR. SCHILLING: Thank you, Your Honor. Andrew
4 Schilling with U.S. Bank. The first question to respond to
5 the government's supplemental statement of interest, and
6 particularly the question of whether or not compliance with
7 false mitigation rules is both a condition of payment
8 anticipation. Just starting more broadly in responding to
9 the government's supplemental statement of interest, their
10 brief makes clear, even more so than their earlier brief,
11 that HUD may not deny insurance claims based on a failure
12 to perform Loss Mitigation. That's the quote from Page 5
13 of their supplemental brief. With respect to the issue of
14 whether or not --

15 THE COURT: So does that help you or hurt you?

16 MR. SCHILLING: That helps me, Your Honor.
17 That's what the regulation says. The realtors have not
18 conceded as clearly as the government has, but I think its
19 regulation is clear on its face and at government's brief,
20 both their initial brief and supplemental brief acknowledge
21 quite clearly on behalf of the government that HUD will not
22 deny insurance claims based on the failure to perform Loss
23 Mitigation. And as we explained in our brief, that makes
24 the case fall away. You need that for a condition of
25 payment analysis and it's not here in this case.

1 THE COURT: So case over, plaintiff, relator?

2 MR. SAMBERG-CHAMPION: Thank you, Your Honor.

3 Sasha Samberg-Champion.

4 THE COURT: You need to take that mic, and if you
5 will pull it closer to you, please. It won't bite you.

6 And you can lower it or raise it depending on your
7 position. Thank you.

8 MR. SAMBERG-CHAMPION: Okay. How's that?

9 THE COURT: A little closer.

10 MR. SAMBERG-CHAMPION: Okay. We have -- there
11 are -- our response is there's basically three parts. So I
12 want to just introduce those three parts and then it will
13 help you to interrupt me where you see fit on this. The
14 first part is that --

15 THE COURT: No, answer the question, and then go
16 to the three parts. Give me your brief answer to the
17 question. Case over --

18 MR. SAMBERG-CHAMPION: No.

19 THE COURT: -- given what you just heard?

20 MR. SAMBERG-CHAMPION: The answer is no. That's
21 the answer to the question. And the reason for that is
22 this regulatory scheme does create a condition of payment
23 as that term is used in the case law under the False Claims
24 Act. And there's sort of a three-step reasoning that gets
25 us there. The first step is that these regulatory scheme

1 creates what is substantially the same effect as the
2 ability to deny a claim outright while also accommodating
3 the government's need to ensure that incontestability of
4 the claim itself.

5 The second part of our argument is that this
6 condition goes to the very heart of the bargain between the
7 bank and the government. And we can discuss that in
8 greater detail.

9 And then the final point is that where those two
10 conditions are satisfied, where you have a remedy that's
11 substantially equivalent to the denial of a claim and where
12 the condition goes right to the heart of a claim, the case
13 law and statute are best construed such that a false claim,
14 false claim act liability is possible. So those are the
15 three parts of the answer. Your Honor, is there a part
16 that particularly concerns you on that?

17 THE COURT: All parts concern me. If you're
18 through explaining them then I'll ask the other side to
19 comment.

20 MR. SAMBERG-CHAMPION: Okay. Why don't I
21 continue then. The first step is sort of the substantial
22 equivalence between this remedy and the ability to outright
23 deny a claim. So what HUD has done here is it has created
24 a scheme in which it -- it can impose two different kinds
25 of penalties. It can impose a penalty that goes to

1 participation. It can kick the lender out of the program,
2 but in the alternative or in addition, it can -- it can
3 impose a claim specific remedy, a remedy that's based on
4 the amount of the claim itself. And under that remedy, it
5 falls back the exact amount of the claim that it paid out,
6 and in addition exacts an additional amount. As the
7 government put it, the effect of this is that is that
8 the -- the complying with Loss Mitigation is a condition of
9 ultimate receipt of the money. And therefore, it's just a
10 matter of accounting tricks, whether you call it -- whether
11 you call it a condition of payment or not. But it would
12 elevate form over substance to say that the fact that the
13 money is initially paid out and that called back is any
14 differences for purposes of False Claims Act Liability.

15 THE COURT: Comment?

16 MR. SCHILLING: Yes, Your Honor. I heard in that
17 response a number of standards in an effort to construct a
18 new construct for what a condition of payment is. There's
19 the substantial equivalence test, the very heart of the
20 bargain test and the condition of ultimate receipt test.
21 None of these are in The Sixth Circuit case law, Your
22 Honor. Some of the briefing that has been going back and
23 forth particularly from the government is -- suggested that
24 the standards are actually not clear in The Sixth Circuit.
25 They are, Sixth Circuit has addressed conditions of payment

1 several times. And in the Hobbs case, which is cited in
2 our brief several times, they explain exactly what a
3 condition of payment is. And on Page 714 of that case,
4 they define condition of payment as meaning, quote, meaning
5 that the government would not have paid the claim had it
6 known the provider was not in compliance, unquote. Since
7 the government would pay the claim even if it knew that the
8 bank was not in compliance with Loss Mitigation, by
9 definition in The Sixth Circuit's definition and not the
10 creative standards being proposed today by counsel under
11 The Sixth Circuit's definition of what a condition of
12 payment is, this claim fails because the regulation
13 specifically provides that payment of the claim will not be
14 denied for Loss Mitigation violation.

15 THE COURT: So Sasha, what do I do with the Hobbs
16 case and the quote in particular?

17 MR. SAMBERG-CHAMPION: Okay.

18 THE COURT: Doesn't help you, does it?

19 MR. SAMBERG-CHAMPION: I actually think the Hobbs
20 case, if you look at more than one -- one sentence, I think
21 it's more consistent with our analysis.

22 THE COURT: What other sentence do you want me to
23 look at?

24 MR. SAMBERG-CHAMPION: Okay. I'd like you --
25 sorry, I don't have the page number.

1 THE COURT: Take your moment.

2 MR. SAMBERG-CHAMPION: Okay. Well, but while
3 we're finding it, just to -- to recount what happened in
4 Hobbs, in Hobbs you had a healthcare provider that was
5 billing Medicare for services --

6 THE COURT: I've got the case. You can skip that
7 part.

8 MR. SAMBERG-CHAMPION: Okay. But the key
9 thing -- the key things that The Court looks at here is
10 that there's no regulation that suggests that failure to
11 comply with the technical requirement at issue here would
12 give rise to any sort of penalty, let alone what are called
13 the Blunt False Claims Act Penalty. If you -- if you think
14 that the condition of payment analysis that my adversary
15 has put forward is literally true, then there would be no
16 reason for The Court to consider that, but it actually
17 looked at the remedies available, and it said that that
18 remedy was disproportionate to the Blunt False Claims Act
19 Remedy. Whereas if you apply that analysis to this case,
20 you can see that the remedy is exactly the same as the
21 False Claims Act. So I think, in context, Hobbs help --
22 Hobbs helps us.

23 The key thing I think to remember with this
24 condition of payment language, that language does not
25 appear in the False Claims Act. That language has been

1 used by The Courts in an effort to determine what we think
2 is exactly the questions that we're posing today, whether
3 this -- whether this goes to the heart of the bargain
4 between the government and -- and the other party, such
5 that the failure to do that and submitting a claim without
6 having done that can be said to be fraudulent, which is the
7 actual statutory term. So in this where it ends up being
8 exactly the same result, we think that complies fully
9 with -- with the reasoning of Hobbs and every other case,
10 really, that have been cited to this Court.

11 THE COURT: Last word over here and then we'll
12 let you continue with I think what was the beginning of
13 your answer --

14 MR. SCHILLING: Thank you, Your Honor.

15 THE COURT: -- to the full question.

16 MR. SCHILLING: A couple of points to respond to.
17 One is the discussion of exactly the same remedy. It's not
18 exactly the same remedy. The fact that HUD, after the fact
19 can decide in its discretion to pursue administrative
20 enforcement against a mortgagee who doesn't comply, that's
21 obviously a completely discretionary decision. They choose
22 to do absolutely nothing. They have the discretion to
23 decide whether it's appropriate to pursue enforcement of
24 the regulatory violation or not to enforce it at all. Even
25 if they did choose to enforce it, there's a number of

1 different ways that they can choose to enforce it. They
2 don't have to go to the mortgagee review board and seek
3 damages or expulsion from the program. During the ordinary
4 course they will audit mortgagees, they will have a back
5 and forth with the mortgagee, they will see if there's a
6 violation and they will work it out. Here the alternative
7 is saying, well, since HUD could, in one of the things it
8 could do to enforce this, one of the things it could do is
9 pursue an action for triple damages on a particular loan,
10 it could do that. But here the question is whether or not
11 we're going to allow relators to make that decision and
12 enforce the regulatory requirements, or is that HUD's
13 decision to enforce the regulatory requirements. Because
14 here the relator has an interest in enforcing the
15 requirements as against every loan without regard to the
16 problematic considerations that the HUD would take into
17 account. They've alleged there have been two billion
18 dollars worth of claims paid, I'm sure if we ever got to
19 the point where they had to itemize them in damages, they
20 would say they want triple damages of \$26 billion plus
21 penalties. There's penalties up to \$11,000 per false claim
22 on top of troubled damages under the False Claims Act that
23 isn't available in the HUD process. So the remedies are
24 not the same under the False Claims Act and under the
25 mortgagee review board and HUD process.

1 THE COURT: Would you concede a regulation can be
2 both a condition of payment anticipation --

3 MR. SCHILLING: It could be in theory. The Sixth
4 Circuit in Hobbs alluded to that indicta and there have
5 been cases, the Hendow case cited in Hobbs and cited in the
6 government's brief I believe did make an observation that
7 in that indication one regulation or one set of
8 requirements did impose both a condition of participation
9 and a condition of payment.

10 THE COURT: So it's not just theory, it is fact?

11 MR. SCHILLING: In other circuits. I'm not aware
12 if the Sixth Circuit has ever found regulation to be both.
13 And in the cases that where that has occurred, the
14 condition of participation itself had conditions of payment
15 in it, basically it was a core eligibility requirement of
16 the program to comply with the particular requirement. And
17 because of that, you wouldn't be paid at all if you weren't
18 in the program, and sort of went to eligibility to begin
19 the program, and therefore eligibility to be paid at all in
20 the Hendow case the regulation specifically spoke about the
21 prerequisite and the conditions of government money
22 flowing. Here, as we pointed out on Page 4 footnote six of
23 our brief, the core eligibility requirements of this
24 program do not relate to Loss Mitigation. There's a
25 handful of requirements that are the core eligibility

1 requirements of this program and Loss Mitigation is not
2 listed among those requirements. So in this case, even if
3 that theory were viable, this would not be both a condition
4 of payment and participation and also just a more
5 fundamental reason. Even if it were a condition of
6 participation, it can't be a condition of payment for the
7 reasons that we've been discussing.

8 MR. SAMBERG-CHAMPION: Your Honor, may I respond?

9 THE COURT: You may.

10 MR. SAMBERG-CHAMPION: With respect to counsel's
11 first point regarding the discretion that HUD has, the
12 situation he's describing is no different than the
13 discretion that an agency has to deny a payment and your
14 classic condition of claim case. And for that reason, as
15 the government said, the test is not whether HUD had
16 actually work -- would have denied the claim had it known,
17 or imposed alternate remedy had it known. The question is
18 whether this would have had a natural tendency to influence
19 HUD's decision making. And I take it -- I haven't heard
20 any -- any argument on that sort --

21 THE COURT: Well, stop. Any argument on that --

22 MR. SCHILLING: Yes, I mean the issue --

23 THE COURT: I can't get you two guys to agree on
24 anything, can I?

25 MR. SCHILLING: Not today, maybe outside this

1 context we will. If we want to start talking about
2 materiality and the natural tendency test, I think that's a
3 couple of questions later, Your Honor. But even if you
4 applied a materiality test, a materiality is an element of
5 the false claims act. It's just a different element and
6 the element of falsity of the claim. If we get to that
7 stage, if you even had to get there, which you don't
8 because the claim isn't false, if you got there it still
9 wouldn't be material because it doesn't have an a natural
10 tendency to influence the payment decision. It only -- if
11 anything, it could be material in theory to -- to an
12 ultimate enforcement decision down the road in HUD's
13 exercise of its problematic discretion to decide what
14 remedies to take against a particular mortgagee, but it is
15 not related to the payment decision. And we need to come
16 back, I think, to the fundamental point which is --

17 THE COURT: You distinguish the fund amount, the
18 difference seems to be you distinguish payment from the
19 ultimate remedy of recouping the payment.

20 MR. SCHILLING: Yes, I think that's critical,
21 Your Honor. And I think that's the way the case law
22 describes what a condition of payment is. That's why in
23 the alternative it's referred to as a prerequisite to
24 payment. And the reason why it's significant and the
25 reason why later remedies that could be imposed down the

1 road don't matter to that analysis is that you come back to
2 the point that The Court did impose this requirement that
3 there be a condition of payment and why did they do that?
4 They did that because we're already in the land where there
5 is no express false statement. There is no express false
6 claim. So we're beyond that. And the -- we're now dealing
7 with what the law will imply to be a false statement or a
8 lie by the person submitting the claim. And what The
9 Courts have said is we have to impose some limitation on
10 that. We have to impose some restriction, otherwise you
11 have people who can just -- relators can enforce regulatory
12 requirements, and they said, and it's not a lie to submit a
13 routine request for payment, and there's a complaint that
14 alleges there have been thousands of requests by the bank
15 and other FHA lenders every day. There are thousands of
16 these claims submitted for reimbursement of the insurance
17 benefits or payment of the insurance benefits. And the
18 condition of payment requirement basically says that in
19 order for those routine submissions of claims to realize to
20 be false, the person submitting them has to know at the
21 time you're submitting them that you're not entitled to
22 payment of this claim. And you knew you weren't entitled
23 to payment of this claim and you made a claim for payment
24 anyway. And that's why if you are entitled to payment of
25 the claim, that claim isn't false. And what courts have

1 said is if it's -- the way to determine whether or not
2 you're entitled to it is does the regulation forbid you
3 from getting paid on that. And here the regulation
4 doesn't. The regulation actually forbids you not to get
5 paid on that claim.

6 THE COURT: What's wrong with what you just
7 heard?

8 MR. SAMBERG-CHAMPION: Well, there -- I mean,
9 there are no cases that say the proposition that U.S. Bank
10 is advancing today, which is that a scheme that has the
11 substantial equivalent of the denial of a claim, it should
12 not be considered exactly the same for False Claims Act
13 purposes. And this scheme is -- if you look -- if you look
14 at the language of 203.500 itself, it's interesting because
15 it actually has both a condition of payment and a condition
16 of participation remedy built in, right next to each other.
17 It says failure to comply will be cause for a position of a
18 civil money penalty, which is then defined in another
19 statute -- another regulation, or withdrawal of HUD's
20 approval of a mortgagee. So you can see right there the
21 difference between a condition of participation and a
22 condition of the claim, both of which are present in this
23 regulation. My adversary got into the idea of whether it
24 would be unfair to impose this remedy, and -- and whether
25 they knew that this was part of the deal, which to us

1 sounds a lot like the heart of the bargain discussion that
2 we were having. So we could go right into what -- why this
3 is the heart of the bargain which we think is actually what
4 The Sixth Circuit and other courts have been getting at
5 when they discuss the condition of payment. If you look at
6 the 203.500, it has an explicit statement, it says it is
7 the intent of the department that no mortgagee shall
8 commence foreclosure or acquire title to a property until
9 the requirement of the sub parts have been followed. And
10 then of course a claim cannot be submitted until -- until
11 they've done that. We think under those circumstances any
12 time a bank submits a claim to HUD, we think it's impliedly
13 warranting really in the clearest possible way that it has
14 followed this condition. And there's many other reasons
15 why we think -- why I think you can quite easily find that
16 statement to be made impliedly. You can look at the
17 certifications that the bank itself makes on a regular
18 basis certifying that that -- that all these requirements
19 have been followed. You can look at all the guidance that
20 HUD sends on a regular basis, which we've also cited to a
21 few times.

22 THE COURT: So let's hear for a moment about the
23 implied warranty theory. Certification, why isn't that
24 enough? Is that not the very heart of the agreement?

25 MR. SCHILLING: No, Your Honor. It's hard to

1 know what the very heart of the agreement is. I'm not sure
2 what that standard is and how to define it. I do know that
3 when you're talking about HUD regulations, HUD isn't shy
4 about putting out rules and regulations. Floor statutes --
5 there's Loss Mitigation and servicing. There are statutes,
6 regulations, HUD handbooks, informal guidance, there are
7 mortgagee letters, I think with respect to programs
8 generally, there have been hundreds of mortgagee letters.

9 THE COURT: Is there anything in the HUD
10 regulations that might give me guidance on this issue?

11 MR. SCHILLING: Well, the regulations that we're
12 speaking of are the most pertinent, Your Honor, that
13 expressly say that you allow the payment of the claim of
14 the -- I think that there is no other False Claims Act case
15 like this where the condition of payment is so
16 unambiguously precluded by the regulatory language, and I
17 think everything else that we're talking about are
18 arguments to try to get around that, but it is clear on its
19 face.

20 MR. SAMBERG-CHAMPION: Your Honor, may I respond
21 to that?

22 THE COURT: Absolutely.

23 MR. SAMBERG-CHAMPION: I think that that would be
24 a more correct statement of the law to say there's no other
25 false claims act cases likes this. False stop. This issue

1 just hasn't been presented to The Court one way or the
2 other.

3 THE COURT: So I'm the lucky one.

4 MR. SAMBERG-CHAMPION: You are the lucky one.
5 But I think what is critical to understand is that there's
6 a reason why HUD has structured the scheme this way.

7 THE COURT: Why?

8 MR. SAMBERG-CHAMPION: The reason why is it's --

9 THE COURT: Where do you find support for your
10 answer? Go ahead.

11 MR. SAMBERG-CHAMPION: It's trying to accomplish
12 two things. It's trying to accomplish both having a
13 penalty that -- that looks for all the world like the
14 ability to deny a claim and accomplishes the same deterrent
15 effect while at the same time protecting the
16 incontestability of the -- of the insurance claim itself.
17 And HUD does that because some of these -- some of these
18 loans travel in the secondary market and they don't want
19 the bank that ultimately has possession of the loan to be
20 punished for the sins of its forbearers with -- with
21 respect to that loan. This gives HUD the ability to go
22 after the bank that's the actual wrong doer as opposed to
23 the bank that happens to have the claim at the time. And
24 that way you can ensure that these loans can pass in the
25 secondary market or be secure ties or any other of the

1 things that happens to loans without anyone having concern
2 about -- about the value of the loan itself.

3 THE COURT: And where do I find support for your
4 reasoning as you've just expressed it?

5 MR. SAMBERG-CHAMPION: I think the best way to
6 find support if you look at the -- if you look -- I'm
7 sorry. If you look at the -- the Federal Register Notice
8 of putting out the final rule itself, and I'm going to get
9 that for you in a moment. And that's -- what I'm referring
10 to now as the troubled damages final rule. So --

11 THE COURT: That's okay. If you find it before
12 we're done today, holler out the answer.

13 Do you concede that U.S. Bank did not make any
14 express certifications of compliance of face-to-face
15 meetings or Loss Mitigation requirements?

16 MR. SAMBERG-CHAMPION: I don't know that I'd go
17 so far to concede, but I would say that the express
18 statement that the U.S. Bank makes with respect to each
19 claim is not as strong as the -- as the clear implied
20 statement. It does -- it does -- it does give a statement
21 that warrant -- that's expresses its understanding that if
22 it hasn't complied with the HUD regulations, that this
23 conveyance is improper and can be undone.

24 THE COURT: Do you want to comment on anything
25 you've heard before we move on?

1 MR. SCHILLING: Yes, Your Honor. In response to
2 that, there is a certification on the HUD form for the
3 single family application for insurance benefits. There is
4 no certification on that form that speaks to Loss
5 Mitigation or the face-to-face ruling. There is language
6 in here that talks about the only certification that's on
7 this form, Your Honor, and it's attached, I think, to our
8 brief. If it wasn't submitted by the relaters in their
9 complaint, talks about the event of damage by fire, flood,
10 earthquake, tornado and boiler explosion. And under
11 certain circumstances, the mortgagee would have an
12 obligation to do -- to fix the damage on the property prior
13 to conveying that property to HUD. The regulations that
14 counsel's referring to are regulations about whether the
15 mortgagee complies with those regulations, the regulations
16 about fixing the house that's been hit. The flood has
17 nothing to do with the regulations of any of the Loss
18 Mitigation servicing.

19 MR. SAMBERG-CHAMPION: Your Honor, may I flush
20 out a little more fully though why this goes to the heart
21 of the -- because I don't think I quite completed my
22 answer. The other reason why this goes right to the heart
23 of the bargain is because compliance with the Loss
24 Mitigation requirements actually goes a long way towards
25 reducing the payout that the government has to make. If a

1 bank fails to comply with the Loss Mitigation requirements,
2 as the examples that we've provided make quite clear, a
3 bank will -- the U.S. government will either have to make a
4 payment that it would never have had to make, or it will
5 have to make a payment that is -- that's substantially
6 higher than the one that would have been required to make.
7 So in that way, the U.S. government is out money every time
8 a bank fails to comply with the Loss Mitigation
9 requirements such that it makes a lot of sense for it to be
10 able to recoup that money against the violaters.

11 THE COURT: So Andrew, Section 203.500, quote, it
12 is the intent of the department that no mortgagee shall
13 commence foreclosure until the requirements of this sub
14 part have been followed, end quote. Part of the agreement?

15 MR. SCHILLING: No, Your Honor. Again, I don't
16 know how to define the heart of the agreement when you
17 have, you know, decades of mortgagee letters and statutes
18 and regulations and requirements. It's hard to know what
19 is the heart of the agreement from HUD's perspective or
20 not. I will say that when you talk about Loss Mitigation
21 requirements and the failure to engage in Loss Mitigation
22 requirements, sometimes that's discussed as if it's a light
23 switch. You're either in compliance or you're not in
24 compliance.

25 THE COURT: What is -- it's not that simple?

1 MR. SCHILLING: It's not that simple, Your Honor.
2 And there are a myriad rules that surround whether or not
3 you're in compliance with Loss Mitigation requirements.
4 You know, one rule says you have to provide, you know, what
5 they call a 426 pamphlet "How to Avoid Foreclosure" between
6 the 32nd day and the 60 day after default. You have to
7 perform certain actions in certain orders. You can only
8 pursue certain types of Loss Mitigation options under
9 certain factual circumstances. You have to send a notice
10 with respect to the Service Members Civil Relief Act within
11 45 days. There's all sorts of requirements surrounding
12 Loss Mitigation, not to mention servicing on top of that.
13 So which of those are sort of at the heart of the bargain
14 or which of those are more important than others, I can't
15 say, because there's no standard, and because it's also
16 frankly irrelevant to the legal analysis. The argument
17 that this is important to HUD doesn't speak to the issue of
18 whether there's a false claims act to be made out of it.
19 HUD, you know, can, if these rules are so important to it,
20 can aggressively enforce them, and they do. They monitor
21 mortgagees, they do audits, they do reviews, they rank
22 servicers in tiers, depending where they fall. And they
23 take actions against mortgagees who don't comply. But the
24 issue of whether or not HUD should do -- do things to
25 enforce the Loss Mitigation requirements is a separate

1 question from whether or not when someone submits a claim
2 for insurance they are lying. And they're not lying when
3 the claim form doesn't say a word about Loss Mitigation or
4 servicing. And they're not lying when the regulations
5 don't condition payment of that claim on compliance with
6 those regulations, and, in fact, say just the opposite.

7 THE COURT: Government doesn't really agree with
8 you, do they?

9 MR. SCHILLING: Not always. No.

10 MR. SAMBERG-CHAMPION: May I respond?

11 THE COURT: You may respond. I'll give you the
12 last word, then I'm ready to move on to question two if you
13 all are.

14 MR. SAMBERG-CHAMPION: There's two points that
15 were packed in there that I think are worth responding to.
16 The first is this business about HUD's discretion and --
17 and the amount of discretion that HUD has to impose a
18 penalty or not. What I haven't heard is how that makes any
19 different from an agency's difficult discretion whether to
20 deny a claim or not. For precisely that reason, that's
21 why, as the DOJ says, the question is not what they would
22 have done but whether it would have a natural tendency to
23 influence their actions. So all this talk about the HUD
24 having discretion is just no different from any other False
25 Claims Act claim. There's very few regulations that

1 require the government to deny payment or otherwise act,
2 but that's never been held to be a reason why the False
3 Claims Act doesn't apply.

4 The other thing I want to address is this
5 discussion about how complicated it is to know whether
6 you've complied with the Loss Mitigation requirements. For
7 exactly that reason it is our burden to prove not only that
8 they failed to comply, but that they knew that they failed
9 to comply. We're going to have to show that. And for us
10 to show that, I think it's going to be our burden to show
11 that it wasn't some ambiguous interpretation at issue or it
12 could have been compliance, it could not have been
13 compliance and they may -- they made an arguable decision.
14 That's not our allegation. Our allegation is they didn't
15 do the bare minimum. That is clearly a violation of the
16 False Claims Act, and for that reason I think, Your Honor,
17 I think very helpfully linked together our discussion of
18 the failure to do a face-to-face meeting with the knowledge
19 requirements. Because that -- that's the sort of thing
20 that's binary. Either you did a face-to-face meeting or
21 you did not. There's no arguable maybe I complied, maybe I
22 didn't comply. That's the reason why we're -- why we're
23 highlighting that in our complaint because these were not
24 arguable violations that we're alleging. These were clear
25 knowing violations.

1 THE COURT: So if it's clear, it's knowing?

2 MR. SAMBERG-CHAMPION: Well, that's actually some
3 courts have said if you want to look at what the knowledge
4 is, you look at how ambiguous it was. If it was ambiguous,
5 then they really didn't know if they had an arguable case
6 to be made that they complied, then -- then they didn't
7 know. But if it was -- if it should have been abundantly
8 clear that this was a violation, then knowledge is
9 possible, yes.

10 THE COURT: So you segued into question two very
11 nicely. You want to keep talking?

12 MR. SAMBERG-CHAMPION: Sure.

13 THE COURT: And identify in the complaint.

14 MR. SAMBERG-CHAMPION: Yes. Okay.

15 THE COURT: Where I find the knowing violation.

16 MR. SAMBERG-CHAMPION: Yes. I think the most
17 obvious place to look is in the certificate on paragraph 60
18 of the complaint where we discuss the certification that
19 was made each year by a vice president of U.S. Bank, Sharyn
20 Blond, in which she didn't just say that the -- didn't just
21 certify compliance to the best of her knowledge. She said
22 that she actually knew or was in a position to know. And
23 so therefore, you have a person certifying both that
24 they're in compliance and that she knows whether they're in
25 compliance every single year. And I think HUD does that

1 for a reason. They do that because they don't want the
2 bank to be able to put forward an ostrich in the stand
3 effect where we just didn't know whether our people were
4 complying each year when we made the certification. It
5 requires that you have actual knowledge. And if you
6 nonetheless didn't have actual knowledge, then that still
7 needs the FCA's knowledge requirement because that would be
8 reckless disregard when you had clear duty to know.

9 THE COURT: Are you playing ostrich, U.S. Bank?

10 MR. SCHILLING: No, Your Honor. There's no
11 factual allegation in the complaint with respect to
12 knowledge. None. There's references to the annual
13 certification's form language. The issue isn't whether or
14 not the person who executes an annual certification knows
15 whether or not the bank is in compliance with regulations.
16 The issue is whether or not when the bank submitted a claim
17 for payment it knew that the claim was false. There's no
18 allegation in the complaint about knowledge with respect to
19 whether the claim was false. There's very few allegations
20 in the complaint at all with respect to the claims, who
21 submitted them? What did they know? That's not in the
22 complaint. When they talk about their burden down the road
23 of proving knowledge, they have a burden right now. They
24 were required to have a good faith basis to allege in their
25 complaint a basis for knowledge. There's nothing in the

1 complaints on knowledge, Your Honor. The fact that someone
2 says I believe that we are in compliance, you can't
3 implicitly infer from that that the person actually
4 believed they weren't in compliance but, again, it doesn't
5 go to compliance. It goes to falsity. And there's no
6 evidence that the bank knew, there's no allegation that the
7 bank knew that when it was submitting claims for payment it
8 was making false statements.

9 MR. SAMBERG-CHAMPION: May I respond to that?
10 Paragraph 70 of our complaint, U.S. Bank knowingly made the
11 request for payment to HUD in violation of those terms. We
12 have alleged squarely what my adversary for some reason is
13 sayings we have not alleged. Now what I'm hearing him say
14 is that we need to, in addition, allege with particularity
15 which bank officials knew what at which time. And my
16 answer to that is I don't see a case, and he's welcome to
17 produce one, that says that at the pleading stage we are
18 required to plead the intricacy of corporate knowledge and
19 say which corporate official had what knowledge. That's
20 not a requirement of Rule 9. Rule 9 only requires that we
21 plead with particularity the actions that constituted
22 fraud. It doesn't require us to plead knowledge with
23 particularity, and for good reason because there's no way
24 we can know in advance which corporate officials were --
25 knew what -- knew what when. Of course even if we did have

1 to show that there was a corporate official, even if we did
2 have to plead right now which corporate official both knew
3 of the -- of the certifications and knew of the falsity --
4 and knew of their falsity, I think the statement by Sharyn
5 Blond speaks for itself even if we had that requirement.

6 MR. SCHILLING: Your Honor, we cite several cases
7 in our brief with the proposition that merely intoning the
8 elements of an offense is not sufficient to plead. You
9 can't plead to knowledge by saying they knew. That's not
10 enough. You have to allege facts, even under -- forgetting
11 about Rule 9(b). Under Rule 8 you have to allege facts
12 that would make it plausible that the bank knew. There's
13 nothing in the complaint about that.

14 MR. SAMBERG-CHAMPION: Okay. May I speak to what
15 makes it plausible that the bank knew, Your Honor? We
16 have -- we have a pattern of the bank -- as we allege, as a
17 matter of policy, not complying with the Loss Mitigation
18 requirements, that systematically, not the face-to-face
19 meeting and the other things that had to do. I think under
20 those circumstances, once you accept those allegations as
21 true as you must, I think it's quite plausible that
22 somebody at the bank knew that they were not in compliance,
23 given that this was not an isolated -- an isolated incident
24 but rather was a company-wide practice. That's what we've
25 alleged. And it's hard to even fathom that someone would

1 not know that they were not in compliance given that.

2 THE COURT: Anything else on question two? If
3 not we'll go on to question three and let plaintiff go
4 first.

5 MR. SAMBERG-CHAMPION: Well, Your Honor, we began
6 to discuss the incontestability clause earlier. And I
7 think DOJ has made quite clear how easily these two things
8 can be square, because they are trying to accomplish two
9 things which are not as in conflict with each other as U.S.
10 Bank would suggest. They want to ensure that each
11 individual loan remains eligible for compensation for
12 whoever holds the loan at the time of the foreclosure. But
13 at the same time they want to make very clear that the bank
14 should not be rewarded with government money if they -- if
15 they have failed to comply with the Loss Mitigation
16 requirements. And that's exactly why they've created this
17 unusual scheme in 203.500 where they have a penalty that's
18 the equivalent of -- of denial of the claim.

19 THE COURT: We I know discussed this earlier.
20 Anything you want to add?

21 MR. SCHILLING: Not much, Your Honor. I would
22 say that, again, our argument just keeps going back to The
23 Sixth Circuit's decision on what a condition of payment is,
24 and it doesn't go to substantial equivalence and the like,
25 and it doesn't go to potential civil penalties down the

1 road or other administrative remedies. As the Chesbrough
2 case that we cite in our brief says, noncompliance
3 constitutes actual fraud only when compliance is a
4 prerequisite to obtaining payment. It's not. I hear them
5 essentially concede that it's not because the payment is
6 incontestable. If it's incontestable it is not a
7 prerequisite to obtaining payment under The Sixth Circuit
8 standard. It is not a condition of payment.

9 THE COURT: And I understand their argument to be
10 that recouping trouble the amount of payment is equivalent
11 of the payment.

12 MR. SCHILLING: And for the reason we discussed
13 earlier, it's not. First of all, it has to be the payment
14 at the front end, not the back end, because, again, it goes
15 to the question of whether or not it was a lie when they
16 submitted the claim in the first place. It's not a lie if
17 you don't know at the time that the regulations preclude
18 you from getting paid because of the incontestability
19 clause. They know when they submit the claim that they
20 will be paid. So they're not lying when they ask for
21 payment, and the --

22 THE COURT: But they might later be found to be
23 lying at that time if, in fact, HUD pursues a an action for
24 recoupment, they would have to show a lie at the time that
25 payment was made. So it's not made at the time of payment

1 it's made later, that is a determination that a lie took
2 place?

3 MR. SCHILLING: The determination they would make
4 later, and later is one way that HUD enforces these rules
5 through a mortgagee review board. But as I say, they also
6 enforce these regulations in the ordinary course through
7 monitoring and reviewing audits and the like. But -- and
8 again, I wouldn't characterize it as a recoupment of the
9 payment. There is an ability to seek a maximum of three
10 times the amount of the insurance benefits, and they're
11 trying to make a lot from the fact that the amount is
12 calculated based on the insurance benefits. But again, as
13 I mentioned earlier, HUD can, in its discretion, pursue
14 absolutely no remedy at all. It can decide to do nothing.
15 And the False Claims Act should be a vehicle to enforce
16 regulatory requirements and allow relators to enforce
17 regulatory requirements when HUD itself may not. And on
18 that -- I'm sorry, Your Honor, on that point, HUD itself
19 has said in enforcing the troubled damages provision, it's
20 not an automatic penalty. It's not as if you submitted the
21 claim, you had to pay the claim because of incontestability
22 but you're going to be hit with damages three weeks from
23 now. Doesn't work that way. But what HUD has said is they
24 reserved troubled damages for the extreme case where
25 there's a pattern, where there's a real problem. They use

1 it as one of their tools in their tool box to enforce these
2 regulations. That's their job. Their job is to enforce
3 these regulations, not relaters.

4 THE COURT: You mentioned The Sixth Circuit
5 earlier. Let's segue into the Whipple case here, recent
6 Sixth Circuit decision, and would like to hear your
7 thoughts. We're now on question four. I'll let defendant
8 go first. In that case -- well, we know what happened in
9 that case. How does that case help you or hurt you? The
10 result doesn't help you.

11 MR. SCHILLING: I think, Your Honor. The Whipple
12 case, we took a look at that and our response was it was
13 addressing an issue that isn't raised in this case. It's
14 addressing a circumstance where the argument from the
15 defendant is the government was aware of this because it
16 had done an audit, but nobody else knew it did that audit,
17 and therefore wasn't public. Whipple case speaks to
18 whether or not the disclosure at issue was public or not.
19 The disclosures that we're relying on are public. We're
20 talking about a public consent order from the OCC, we're
21 talking about articles in the Wall Street Journal and The
22 Plain Dealer and USA Today. So these are all public
23 issues. The Whipple case doesn't hurt or help our case
24 frankly, Your Honor.

25 MR. SAMBERG-CHAMPION: You'll be pleased to know

1 that for once I largely agree with the analysis that U.S.
2 Bank has put forward. We don't think that the Whipple case
3 materially changes our arguments with respect to public
4 disclosure. I think we've, you know, we've adequately
5 addressed public disclosure in our brief. And it doesn't
6 appear that the -- that U.S. Bank is challenging the sort
7 of the line-by-line assessment that we gave you in our
8 attachment. They don't challenge any of that in our reply.
9 So I think at this point it's pretty clear that none of the
10 disclosures they've put forward meet the test for public
11 disclosure.

12 THE COURT: Well --

13 MR. SCHILLING: I don't --

14 THE COURT: Well, let me comment and then give
15 you both a chance to respond. The facts of Whipple are not
16 the facts of this case. We don't have a private
17 intra-agency discussion. We have a public consent order,
18 April of 2011. We have an inter-agency review of
19 April 2011. I believe both of those are public documents
20 available. We have news articles that counsel referenced,
21 Wall Street Journal, Plain Dealer, USA Today, Daily News.
22 We have a published Ohio Court of Appeals opinion back in
23 2010 discussing the homeowners defense that U.S. Bank did
24 not hold a face-to-face meeting before initiating the
25 foreclosure action. Why does this not meet under the

1 guidelines and the discussion in Whipple a defense that the
2 claims were publicly disclosed and have been frankly for
3 some time?

4 MR. SAMBERG-CHAMPION: Well, because none of
5 these -- none of these disclosures deal with the actual
6 fraud that's at the heart of this case.

7 THE COURT: But the law doesn't require that. It
8 allows the fraud to be inferred from the publicly disclosed
9 fact.

10 MR. SAMBERG-CHAMPION: That's true.

11 THE COURT: And why isn't that applicable here?

12 MR. SAMBERG-CHAMPION: Because none of these
13 facts even suggest that U.S. Bank was failing to comply
14 with Loss Mitigation in the -- in the FHA mortgage arena
15 specifically. And then submitting a claim for insurance
16 with respect to other --

17 THE COURT: Stop. Agree with what he just said?

18 MR. SCHILLING: No.

19 THE COURT: Well, cite me to something that
20 contradicts what he just said. Where in these public
21 documents do we have a contradiction of counsel's
22 statement?

23 MR. SCHILLING: Well, I think in the public
24 documents what you see a very broad review of the bank's
25 Loss Mitigation and servicing programs. The HUD program is

1 part and parcel of the bank's process. So to say that they
2 look broadly but they didn't look narrowly, that doesn't
3 make any sense to me. It's obviously part of the whole.
4 If you're looking at Loss Mitigation of Servicing of U.S.
5 Bank, a part of that is the FHA program. And certainly
6 from the perspective I hate to keep harping back on the
7 Sixth Circuit standards, but in the Bocce (phonetic) case
8 they say that the issue is whether the information is
9 sufficient to put the government on notice of the
10 likelihood of related fraudulent action. If the government
11 was fully aware of Loss Mitigation and failures and
12 searching failures on the part of servicing failures like
13 and including U.S. Bank action, then all they would have to
14 do to put two and two together is all the relator has done
15 in this case, which is to say, well, they were not
16 complying and they submitted claims for insurance, because
17 that's the fraud. The fraud that they've alleged is
18 noncompliance on one hand and the routine submission of
19 claims on the other. If that's all the fraud is, that's
20 out there. And they didn't -- HUD doesn't need the relator
21 to bring this case to their attention. This was on the
22 radar screen of every regulator in Washington following the
23 financial crisis.

24 MR. SAMBERG-CHAMPION: Well, Your Honor, the
25 problem with that analysis is just that the FHA program,

1 the Loss Mitigation is very different. The rules are
2 different. The importance are different. The
3 certification as made to the government is different than
4 any of this private -- other private loan programs that
5 which is -- were all that the defendant has been -- has
6 been able to put forward. Our argument here, our case is
7 based on the violation of very spec -- very FHA specific
8 regulations, regulations that serves a purpose that make no
9 sense in any -- any of the other schemes. This is a scheme
10 in which the government itself is backing the mortgage in a
11 way that's different from all these other schemes. So
12 in -- in the other schemes if you fail to comply with the
13 Loss Mitigation requirements, that may be bad for the
14 homeowner but it doesn't have the same effect on the
15 government perks as what we have here, therefore it's not
16 fraud on the government. This is -- this is the first time
17 that it's been disclosed that what U.S. Bank is doing is
18 defrauding the government in this way.

19 THE COURT: But you don't have to have that
20 explicit disclosure for it to be a public disclosure,
21 right? We have a public disclosure going back to 2011.
22 U.S. Bank included, among others, where there was an
23 assessment and whether there was evidence that servicers
24 generally attempted to contact distressed borrowers prior
25 to initiating the foreclosure process to pursue Loss

1 Mitigation alternatives, including loan modifications.
2 That was a specific part of the 2011 examination. Why
3 isn't that enough? Especially in light of the Sixth
4 Circuit law that says it does not have to include an
5 allegation of fraud. It can allow the inference of fraud.

6 MR. SAMBERG-CHAMPION: Well, certainly to take
7 that statement, if these -- if you saw in any of these
8 sources a sentence that said to the -- or suggested that
9 U.S. Bank is -- is systematically not following its
10 requirements, Loss Mitigation requirements with respect to
11 the FHA program, then perhaps you could infer from that
12 that it's also committing fraud, that it's also sending
13 fraudulent claims into the government for payment. But
14 none of their sources even say that. None of their sources
15 even say that the FHA program in particular has these --
16 has these violations going on. And in any event, Your
17 Honor, as I think we've made clear in our briefing, even if
18 you thought that in some fashion this met the public
19 disclosure bar, quite clearly relaters have materially
20 added to the understanding of the scheme here such that
21 they are original sources. So at the end of the day it
22 doesn't -- I'm not sure anything turns on it.

23 THE COURT: What is the realtor's source of
24 information here in this case? What, on record, do I have
25 that tells me what their source was?

1 MR. SAMBERG-CHAMPION: Well, in the complaint
2 itself, it makes clear that they've gone and spoken with
3 homeowners who have been affected by U.S. Bank's actions.
4 That's the original information that they have. They've
5 gone and they've spoken with owners, and they've made clear
6 this pattern of behavior that U.S. Bank is engaged in,
7 information that it appears none of the sources that U.S.
8 Bank has disclosed and was not publicly known in any other
9 fashion before this lawsuit.

10 THE COURT: So it appears the disagreement here
11 is whether there is public information about systematically
12 not following the regulations. Is there any public
13 information that U.S. Bank was not systematically following
14 regulations?

15 MR. SCHILLING: Your Honor, the allegations that
16 the plaintiff has made are that there was a systematic, you
17 know, defrauding of HUD, and a systematic failure. It's
18 hard to find that specific in the public disclosures,
19 because frankly we don't believe that the bank was doing
20 that. But our point is that the issue of general failings
21 by servicers, including U.S. Bank in the area of Loss
22 Mitigation and servicing have been publicly disclosed.
23 They were disclosed in the reports that we've been
24 discussing. And all the relator has added is an accusation
25 on top of that, that that amounts to fraud. And merely

1 adding commentary on top of public facts and saying, well,
2 that's a fraudulent scheme, doesn't suffice. And in
3 response to the point about the relator being an original
4 source under the False Claims Act, that their information
5 has to be both independent of a materially add to the
6 publicly disclosed information is not independent, because
7 it's not their information. It's information that was told
8 to them from someone else. Therefore, it's entirely
9 derivative of the knowledge of others, and they're not an
10 independent source of that information. It doesn't
11 materially add anything. If you say that large lenders
12 were not engaging in Loss Mitigation with respect to
13 thousands of borrowers, it doesn't materially add any
14 information to say I know three of them, and that's all
15 they've added to this.

16 THE COURT: What does the record show on how ABLE
17 found the three properties that are listed in the
18 complaint?

19 MR. SAMBERG-CHAMPION: I don't know that we've --
20 we've put that with any degree of specificity in our
21 complaint, our method of finding them. I don't know that
22 we're required to say exactly how we went and found them.
23 We have said that none of these allegations were -- were
24 publicly disclosed before, and that's true. I do want to
25 respond to an interesting way that my adversary just put

1 his response. In essence, he's trying to have it both
2 ways. He's saying in one breath, well, we didn't do any of
3 these things, and the second breath he's saying everyone
4 knew we were doing these things and they've always known we
5 were doing these things. And I think the first point is,
6 has been U.S. Bank position until now and it has been and I
7 don't think you'll find that any -- any of the sources they
8 put forward disclose or disclose that U.S. Bank was doing
9 this before. So I don't think it can be said that everyone
10 knew that U.S. Bank was engaging in a campaign of not
11 following the FHA regulations which we will not accept the
12 inflation of the FHA program with all these other -- with
13 all these other programs. I don't think --

14 THE COURT: They don't have to show that everyone
15 knew.

16 MR. SAMBERG-CHAMPION: No, but they have to show
17 that someone knew that it had been publicly disclosed.

18 THE COURT: So we have all your evidence of that
19 you've attached of your public disclosure. Are you
20 talking, I think counsel's suggesting you're trying to have
21 your cake and eat it too.

22 MR. SCHILLING: No, Your Honor. My point was
23 simply that these -- the characterization of this as a
24 campaign and a fraudulent one is the relators. And the
25 facts on which that they are basing that spin, that

1 argument comes down to allegations of a failure to comply
2 with Loss Mitigation and servicing. What I'm saying is
3 that allegations that U.S. Bank had had a failure of Loss
4 Mitigation and servicing that was publicly known. That is
5 the heart of what they're alleging. That goes to the core
6 of what they've been alleging the entire time. They've put
7 a spin on it by saying and they're submitting claims,
8 therefore, it's a campaign, it's a pattern, it's fraud.
9 But we don't have to show that their characterization of
10 the facts is public. We have to show that the underlying
11 information was out there such that the government was
12 aware of the facts that they are now trying to raise in
13 this case. And the government certainly was aware of
14 allegations that U.S. Bank and other servicers at the time
15 were not performing Loss Mitigation and servicing up to
16 standards.

17 THE COURT: Oh, let me have some fun. Was the
18 government aware? Do you want to respond to the question
19 or do you pass?

20 MS. FITZGERALD: If I'm allowed to pass I will,
21 but if you require a response we have one.

22 THE COURT: Well, go ahead. Let's hear what you
23 have to say.

24 MS. FITZGERALD: I think that, you know, as a
25 preliminary matter, U.S. Bank raised the issue of rather --

1 that we chose not to object in this case on the public
2 disclosure grounds, and I think that it's important that
3 The Court not read anything into that other than we chose
4 not to object here.

5 In terms of specific government knowledge, I
6 think that, you know, U.S. Bank has pointed out the
7 articles, that that is a general source of information that
8 in terms of whether that is sufficient to qualify as public
9 disclosure under these facts we would just defer to The
10 Court.

11 THE COURT: So much for fun. Okay.

12 MS. FITZGERALD: Thank you.

13 THE COURT: Thank you.

14 MR. SAMBERG-CHAMPION: Your Honor, may I respond
15 to the defendant's point, because I think --

16 THE COURT: What if I said no?

17 MR. SAMBERG-CHAMPION: Well, then I'd have to
18 live with it.

19 THE COURT: No, of course you may. Go ahead.

20 MR. SAMBERG-CHAMPION: I think the defendant's
21 statements that you just heard, once again, the defendant
22 is saying these -- these documents show a pattern of
23 failing -- failure to perform Loss Mitigation but I'm not
24 hearing FHA in the defendant's statements. And the reason
25 why that's important is because the FHA program is the one

1 that requires these certifications. It's the one in which
2 you send in a claim for money that can be fraudulent. So
3 if all these other sources do not go to the FHA program,
4 then they really don't -- they don't suggest fraud at all.

5 THE COURT: So why isn't that fatal to the bank's
6 claim?

7 MR. SCHILLING: Well, Your Honor, HUD knows U.S.
8 Bank is an FHA lender. The government is aware that U.S.
9 Bank is an FHA lender. It's publicly known that U.S. Bank
10 is an FHA lender, it's available on HUD's website. It's
11 common knowledge that the bank is an FHA lender. So,
12 again, all the plaintiffs are doing is adding a spin to
13 publicly known facts. HUD doesn't need the relators'
14 information to know that U.S. Bank is a HUD lender. And to
15 know that during certain periods of time the bank had been
16 accused of not fulfilling its obligations with the Loss
17 Mitigation and servicing, and they are the ones who,
18 therefore, should be enforcing these regulations.

19 THE COURT: Thank you. I'll allow either side a
20 couple minutes if they wish to add anything that we haven't
21 already covered either in the briefing or argument today.

22 MR. SAMBERG-CHAMPION: Your Honor, we would like
23 to use some of that time then to talk about the reverse
24 false claims theory that we've also put forward. One thing
25 that we would like to put forward that we haven't had a

1 chance to discuss yet is that the legislative history that
2 appears in the briefs of both parties remains incomplete.
3 After the -- after the Kyl amendment which defendant
4 describes in its brief, the bill was then subsequently
5 considered on the house floor. And on the house floor
6 there was a statement made that suggested that the house
7 continued to believe that this bill reaches contingencies,
8 and there's a good reason why it would think that because
9 the language of the bill that was actually passed continues
10 to reach contingencies.

11 THE COURT: Was this a bill that the house
12 actually read before they passed, unlike some other
13 legislatures?

14 MR. SAMBERG-CHAMPION: Does the house read
15 anything, Your Honor? I think we always have to assume.
16 Even if it's a fiction that they've read what they've --
17 that they've read what they're passing judgment on. If I
18 could pass this up to The Court at some point --

19 THE COURT: As long as you have one for opposing
20 counsel too.

21 MR. SAMBERG-CHAMPION: I actually brought two
22 copies for opposing counsel. So related to that I think we
23 need to look at the bill as actually passed. And I also --
24 I also have a hand out on that so we can just go over the
25 language together and I can show you why this reaches the

1 conduct at issue in this case. So you can see at the top
2 of this sheet the -- the new definition of obligation that
3 was in the bill as it was reported by the Senate committee,
4 and at that time the bill defined obligation as a fixed
5 duty or a contingent duty. So it had two different kinds
6 of concepts, one you had a fixed duty and the other was a
7 contingent duty. And then it listed a few different things
8 that are -- were examples of contingent duties. What Kyl
9 did was he struck the word contingent, but he left in place
10 almost all of the same types of obligations that the prior
11 version called contingent duties.

12 Now, the language says an obligation, it's an
13 established duty, whether or not fixed, arising from all of
14 the same time things. So our argument is what we have here
15 is an established duty that, to be sure has not been fixed
16 but is not required to be fixed that arises from a statute
17 or regulation. At the very moment that they failed to
18 comply with the Loss Mitigation requirements, they were --
19 they were liable should HUD choose to -- should HUD choose
20 to enforce it. They had an obligation to -- to pay money
21 to HUD. And the fact that it had not been fixed by HUD, to
22 us that's immaterial to the analysis because the statute
23 says it's immaterial.

24 So I think to the extent that they're saying that
25 Senator Kyl's amendment took this out of the land of

1 reverse false claims, I would say to Your Honor to look at
2 the language and see whether his amendment actually
3 accomplished that. I don't think it did.

4 MR. SCHILLING: Your Honor, I'm happy to debate
5 legislative history but we're relying on the language of
6 the statute that was actually enacted and the cases that
7 have interpreted it. The statute currently requires
8 established duty that has been the standard for some time.
9 It's not an established duty if HUD is the discretion to
10 pursue enforcement later. That established duty has to
11 attach prior to the time you make the false statement or
12 you engage in the improper conduct. Here there's no
13 allegation that there was an established duty to pay
14 anything, just because HUD could choose in its discretion
15 down the road later to pursue an enforcement action, that's
16 what the case law says. That's consistent with the
17 requirement that the obligation had to be an established
18 duty that exists at the time of the false statement. And
19 with respect to the legislative history, just because I
20 can't help myself, the reason they struck the word
21 contingent from the statute was precisely to address this
22 issue, precisely. It couldn't have been more clear.
23 Senator Kyl said obviously we don't want the government or
24 anyone else suing under the False Claims Act to trouble and
25 enforcify (sic) before the duty to pay that fine has been

1 formally established. It is unlikely that justice would
2 have ever brought suit to enforce a claim of this nature,
3 but the FCA can also be enforced by the private relators
4 who often may not be motivated -- who may be motivated by
5 personal gain and may not always exercise the same good
6 judgment that the government usually does. It was a
7 concern by congress that relators would try to enforce the
8 reverse False Claims Act on the basis of potential future
9 civil penalties. That's this case, Your Honor, and that's
10 exactly why they struck the word contingent from the
11 statute.

12 MR. SAMBERG-CHAMPION: Your Honor, may I respond
13 to that?

14 THE COURT: You can have the brief last word.

15 MR. SAMBERG-CHAMPION: Thank you. I think my
16 adversary is correct. Again, I'll acknowledge that he's
17 correct in saying that this doesn't reach any far flung
18 obligation. It only reaches an established duty. And if
19 you look at the statute as a whole, I think the best
20 reading of established duty is a duty that is comparable on
21 just going the other way to the materiality test in the --
22 for a conventional false claim. After all, the purpose of
23 the Reverse False Claim Act Provision in the first place is
24 to ensure that nothing turns on just the accounting of
25 which direction the money goes. Whether -- whether it is

1 that the -- whether it is that the U.S. Government is
2 paying out money or whether it is that the defendant is
3 getting the U.S. Government not to take money from it, I
4 don't think anything should turn on that. And I think
5 that's what the reverse -- the point of the Reverse False
6 Claim Provision is in the first place.

7 In that context, I think we can read established
8 duty as doing some work, the work it does is to ensure that
9 it meets the same materiality requirements as would be met
10 from a standard false claim. But in that context, we think
11 that at this point, the reason for this is so that exactly
12 the sort of argument that we're having today about whether
13 a claw back mechanism that functions -- that leaves the
14 defendant in exactly the same place as if it had had its
15 claim denied in the first place whether that is a False
16 Claims Act. The purpose of the Reverse False Claims Act
17 theory is to avoid this sort of accounting trick that try
18 to avoid liability just based on -- just based on form and
19 not substance.

20 THE COURT: Thank you all counsel. Appreciate
21 your preparation. And this has been helpful to The Court.
22 And we will not make a promise of when our decision will
23 come out, but we will turn to it very shortly. And I'm
24 sure by the end of the month we'll have something for you.
25 Safe travels, we're adjourned.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

s:/Angela D. Nixon

Angela D. Nixon, RMR, CRR

Date

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